Filed 7/23/10 P. v. Chapman CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent, **A125590**

v. **(Alameda County Super. Ct. No. CH43930)**

MICHAEL JAMES CHAPMAN,

Defendant and Appellant.
_____/

A jury convicted appellant Michael James Chapman of numerous felonies, including kidnapping (Pen. Code, § 207, subd. (a)),[1] rape by threat (§ 261, subd. (a)(6)), penetration by a foreign object (§ 289, subd. (a)(1)), and forcible oral copulation (§ 288a, subd. (c)(2)). The court sentenced appellant to 51 years and 8 months in state prison.

On appeal, appellant contends the court abused its discretion by admitting evidence of prior uncharged acts of sexual and domestic violence. He also claims the court erred by instructing the jury with CALCRIM Nos. 850 and 1190. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We provide only an overview of the facts here. We provide additional factual and procedural details as germane to the discussion of appellant's specific claims.

[1] Unless otherwise noted, all further statutory references are to the Penal Code.

Jane Doe met appellant when she was 13. Appellant was seven or eight years older than Doe. When she was 15, Doe began using marijuana and methamphetamine with appellant. Doe became physically intimate with appellant when she was 16 but did not become his girlfriend until she was 19.

Appellant was a member of the Norteño street gang, Fairway Park; his gang name was "Kid." When appellant was in the presence of his gang friends, he assumed the persona of "Kid" and became "violent and ugly." "Kid" was "known for violence" and for "kidnapping [ ] people that owed debts[.]" When appellant was alone with Doe, however, he was more "understanding about things[.]" Nevertheless, Doe was afraid of appellant. Doe moved into appellant's apartment in Union City and became pregnant.[2] When she became pregnant, appellant began physically abusing her.

On October 13, 2006, Doe was at appellant's apartment with their daughter. She left the apartment to take out the trash; while she was outside, she talked with Matthew Crow, the security guard for the apartment complex. When she returned to the apartment, appellant opened the door and punched her in the face, breaking her jaw. Appellant told Doe he did not like it when she talked to Crow. Appellant's half-sister took Doe to the hospital; appellant instructed Doe to tell the "doctors that [she] had a seizure in the bathroom and fell and hit [her] mouth on the sink." Doe's mouth was wired shut at the hospital. A week later, appellant became angry with Doe and pulled out the wires.

On November 19, 2006, Doe told appellant "he was acting stupid" and he "explode[ed]." He slapped Doe and pushed her, even though she was holding their daughter. Their daughter fell to the ground and cut her face. Appellant then pushed Doe against a wall and choked her. Then he picked up a knife, held it to Doe's throat, and

---

[2] Appellant and Doe had a daughter in 2006. Doe has a son from another relationship. Some time after October 2006, Doe was playing with her son at appellant's apartment while appellant was at work. When appellant came home and saw Doe's son, he became angry and threatened to "shoot the little bastard."

told her he was going to kill her. Doe poked appellant in the eye with her thumb, ran outside, and asked Crow to call the police.

Later that month, Doe ended her relationship with appellant and moved into a domestic violence shelter. Appellant obtained Doe's telephone number through his ex-girlfriend, Roxanne C., and called Doe. He told Doe that he wanted to see his daughter and give her a Christmas present. Doe agreed to meet appellant in a public place as long as none of his gang friends were present.

Appellant met with Doe and their daughter at a restaurant on the evening of December 12, 2006. While they were there, Doe saw a friend's grandfather and talked with him briefly. A few minutes later, Doe returned to where appellant was sitting and told him she wanted to return to the shelter because she had a curfew. Appellant accused Doe of "want[ing] to go fuck that guy." Doe again asked to leave, prompting appellant to threaten to kill Doe's son if she left.

Appellant grabbed their daughter, put her in the stroller, and left the restaurant. Doe went with them because she was afraid and because appellant "had [her] daughter." Appellant stopped at a convenience store to "get a few beers." He told Doe "not to act funny" while she was in the store because "he would hurt whoever [she] was trying to tell." When they returned to the apartment complex, appellant saw a group of girls and asked them whether they had seen Crow, because he wanted to "beat his ass."

When they returned to appellant's apartment, appellant barricaded the front and back doors. Later, Doe fell asleep while appellant played with their daughter. When Doe woke, appellant was "caressing [her] breasts and had his hands down [her] pants." Doe told appellant to stop, but he refused, telling her it "was his right" because she was his "bitch." Appellant instructed Doe to lay down; he told her he was going to make her cry and make her "feel pain." He eventually forced her to orally copulate him and to have sex with him. Doe cried the entire time.

After removing the battery from Doe's cell phone so she could not call for help, appellant left the apartment. When he returned, appellant took Doe into the bathroom and threatened to beat her "to death" with a metal rod. Appellant began smoking

methamphetamine and told Doe she "wasn't going to make it out alive[.]" He also said that if the police came, Doe would have to watch the police kill him. He cut himself with a razor blade to show that "he wasn't afraid." That night, appellant forced Doe to have sexual intercourse numerous times and forced her to orally copulate him.

When appellant left the apartment on December 14, 2006, Doe found a cell phone battery that fit her phone and called 911. Police officers came to the apartment and took Doe and her daughter to the police station, and then to the hospital. The officers eventually arrested appellant.

The jury convicted appellant of assault with a deadly weapon or with force likely to cause great bodily injury (§ 245, subd. (a)), corporal injury to a child's parent (§ 273.5, subd. (a)), two counts of criminal threats (§ 422), kidnapping (§ 207, subd. (a)), false imprisonment by violence (§ 236), four counts of rape by threat (§ 261, subd. (a)(6)), penetration by a foreign object (§ 289, subd. (c)(2)), and two counts of forcible oral copulation (§ 288a, subd. (c)(2)). The court sentenced appellant to 51 years and 8 months in state prison.

DISCUSSION

Appellant raises three claims on appeal. He contends the court erred by: (1) admitting evidence of appellant's prior uncharged acts of sexual and domestic violence; (2) instructing the jury with CALCRIM No. 850; and (3) instructing the jury with CALCRIM No. 1190.

The Court Did Not Abuse Its Discretion by Admitting Evidence Regarding Appellant's Prior Acts of Sexual and Domestic Violence

Before trial, the People moved in limine to admit evidence of appellant's acts of sexual and domestic violence against his two former girlfriends, Roxanne C. and Nicole Nicole E. The People argued the evidence was admissible pursuant to Evidence Code sections 1108, and 1101(b). The People also argued section 352 did not preclude the admission of the evidence. Defense counsel objected, claiming the evidence was "highly prejudicial." The court admitted the evidence over appellant's objection, concluding

section 1108 "specifically allows for the admission of such evidence," and that the evidence was not more prejudicial than probative under section 352.

Testimony of Roxanne C.

Roxanne C. dated appellant and had a son with him. Appellant was in a gang and went by the name "Kid." When appellant was with his gang friends, he was "[m]ore rough" and was a "bad person" who hit her, cursed at her, and verbally abused her. Her relationship with appellant was "good at first" but "got kind of abusive."

On April 8, 2004, Roxanne C. was outside of her apartment with one of appellant's childhood friends, Jack Womack. While Roxanne C. and Womack were talking, appellant arrived and yelled at Roxanne C. through an iron gate leading into the apartment complex. Appellant said he was going to "kick [Roxanne C.'s] ass" and break her jaw. He also spit in Roxanne C.'s face.

After he was arrested in connection with the incident involving Doe, appellant called Roxanne C. and asked her to lie to the prosecutor for him.

Testimony of Nicole E.

Because of a birth defect, Nicole E. can only see out of her right eye. Nicole E. met appellant when she was 13 or 14. He was "much older" than Nicole E. and knew about her vision problems. Nicole E. began dating appellant and moved in with him. Eventually, Nicole E. became pregnant.

Nicole E. calls appellant "Michael," but his gang friends call him "Kid." Michael "used to treat [Nicole E.] nice," but Kid "show[ed] off in front of his friends" and treated Nicole E. "bad." After the birth of their son, appellant started mistreating Nicole E. because he "was jealous of [his] son." He was also jealous when she "was around any other guy."

Appellant began hitting Nicole E. and being "real violent" toward her. He kicked, punched, and slapped Nicole E.; he tried to cut her with a knife and burn her with a blowtorch. He also tried to strangle her. Appellant hit Nicole E. on her left side because she could not see out of her left eye. Appellant also threatened to kill Nicole E. and "blow up the house" where she was living. On one occasion when Nicole E. was at

appellant's mother's house, appellant came to the kitchen window and asked for food. When Nicole E. told him to go away, he broke the window and climbed inside. Appellant cut Nicole E.'s face with a knife and tried to stab her in the stomach. Appellant also forced her to have sex with him three or four times. Appellant held Nicole E. down and squeezed her throat; she was unable to get away because appellant was stronger. Nicole E. eventually ended the relationship.

Appellant concedes the evidence of his prior acts of sexual and domestic violence against Roxanne C. and Nicole E. is admissible under sections 1108 and 1109.[3] "[S]ection 1108 authorizes the admission of evidence of a prior sexual offense to establish the defendant's propensity to commit a sexual offense, subject to exclusion under [ ] section 352." (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286; 1 Witkin, Cal. Evidence (4th ed. 2000) Circumstantial Evidence, § 97, p. 443.) Put another way, section 1108 ""'permit[s] the jury in sex offense . . . cases to consider evidence of prior offense *for any relevant purpose*" [citation], subject only to the prejudicial effect versus probative value weighing process required by section 352.'" (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1274, quoting *People v. Britt* (2002) 104 Cal.App.4th 500, 505.) In turn, section 1109 "permits the introduction, in a prosecution for a domestic violence offense, of evidence of the defendant's commission of other domestic violence, if the evidence is not made inadmissible under [section] 352[.]" (1 Witkin, Cal. Evidence, *supra,* § 98, p. 446; *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138, 1139.)

---

[3] Unless otherwise noted, all further statutory references are to the Evidence Code. Section 1108, subdivision (a) provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." Section 1109, subdivision (a)(1) provides, subject to two exceptions not relevant here, that "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

To determine whether to admit evidence of prior uncharged offenses, the trial court must consider various factors, including: (1) the similarity to the charged offense; (2) the likelihood of confusing, misleading, or distracting the jurors; (3) the remoteness of the uncharged offense; (4) its likely prejudicial impact on the jurors; (5) the burden "on the defendant in defending against the uncharged offense;" and (6) the availability of less prejudicial alternatives to admitting the evidence. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917; *People v. Ewoldt* (1994) 7 Cal.4th 380, 404-405, superseded by statute on other grounds as stated in *Britt, supra*, 104 Cal.App.4th at p. 505.) We review a trial court's decision to admit prior uncharged acts of sexual and domestic violence for abuse of discretion. (*Lewis, supra*, 46 Cal.4th at p. 1286; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.)

Appellant claims the evidence of his prior sexual and domestic violence against Roxanne C. and Nicole E. was inadmissible under section 352 because it had limited probative value, was inflammatory, and was likely to confuse the jury. He is wrong. The probative value of the Roxanne C. and Nicole E. testimony was strong. The offenses involving Roxanne C. and Nicole E. shared many similarities with the Doe incident. In all three instances, appellant impregnated a young and vulnerable woman and then abused her verbally, emotionally, and physically. The Roxanne C. and Nicole E. evidence demonstrated appellant's propensity to commit violent acts against Doe and his willingness to engage in escalating violence against the mothers of his children. Roxanne C. and Nicole E.'s testimony also corroborated Doe's testimony.

Contrary to appellant's argument, the evidence of appellant's sexual and domestic violence against Roxanne C. and Nicole E. was no more inflammatory than the charged crimes. Appellant spit on Roxanne C. and threatened to "kick [her] ass" and break her jaw. Appellant tried to cut Nicole E. with a knife and burn her with a blowtorch; he threatened to kill her and "blow up the house" where she was living. He also forced Nicole E. to have sex with him. These acts are not more inflammatory than appellant's behavior against Doe. Appellant: (1) broke Doe's jaw and then forcibly removed the wires after it had been wired shut; (2) held a knife to Doe's throat; (3) threatened to beat

Doe to death with a metal rod; (4) threatened to kill himself; and (5) forced Doe to have sex with him and orally copulate him. Nor was the evidence, as appellant contends, likely to confuse the jury. Roxanne C. and Nicole E. testified, in simple terms, about how appellant had abused them. Their testimony was not long or distracting, and it certainly was not confusing.

We reject appellant's argument that the evidence of appellant's sexual and domestic violence was unduly prejudicial. The evidence was harmful to appellant, but it was not prejudicial in the sense that it would cause the jury to decide the case on an improper basis. (See *People v. Walker* (2006) 139 Cal.App.4th 782, 806.) Moreover, the court instructed the jury on how to evaluate the evidence of appellant's prior acts to avoid the possibility of undue prejudice. For all of these reasons, we conclude the court did not abuse its discretion by admitting the Roxanne C. and Nicole E. evidence.

Like many courts before us, we reject appellant's contention that sections 1108 and 1109 violate the due process clause of the federal Constitution. In *Falsetta*, the California Supreme Court upheld section 1108 "against [a] due process challenge" identical to the one appellant makes here. (See *Falsetta, supra,* 21 Cal.4th at p. 917.) And several courts have "upheld the constitutionality of section 1109 against similar due process challenges." (*Jennings, supra*, 81 Cal.App.4th at p. 1310, citing cases.) We need not reiterate the reasoning of these cases here, particularly where appellant has not argued these cases were wrongly decided. (*People v. Price* (2004) 120 Cal.App.4th 224, 240.)

The Court Did Not Err by Instructing the Jury with CALCRIM No. 850

Appellant contends the court erred by instructing the jury with CALCRIM No. 850 because it "invit[ed] the jury to find the prosecution witness more believable" and to "convict appellant 'on a lesser showing than due process requires.'"

The court instructed the jury with CALCRIM No. 850 as follows:

"You have heard the testimony from Officer Randy White regarding his experience investigating domestic violence cases. [¶] Officer Randy White's testimony about domestic violence cases is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider his testimony only in deciding whether

or not Jane Doe's conduct was not inconsistent with the conduct of somebody who has been abused, and evaluating the believability of the testimony."[4]

Section 1107 authorizes expert testimony on "battered women's syndrome."[5] (*People v. Brown* (2004) 33 Cal.4th 892, 895.) Section 1107, subdivision (a) provides: "In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding intimate partner battering and its effects, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge." It is well settled that evidence relating to intimate partner battering is relevant to the reasonableness of the victim's actions and to her credibility. (*Brown*, *supra*, 33 Cal.4th at p. 903; *People v. Morgan* (1997) 58 Cal.App.4th 1210, 1214.)

Appellant's next claim — that the instruction "invite[d] the jury to find the prosecution witness more believable" — defies logic and common sense. CALCRIM No. 850 cautioned the jury to use White's testimony for the limited purpose of evaluating the Doe's testimony. It did not suggest Doe was telling the truth, or that the intimate battering had occurred. (See *People v. Housley* (1992) 6 Cal.App.4th 947, 959.) There is

---

[4] Officer White testified as follows: He is an investigator for the domestic violence unit of the Oakland Police Department and has interviewed over 1,000 victims of domestic violence. White testified about the dynamics of domestic violence and "what victims of domestic violence commonly do," not about the facts of appellant's case. White explained that in relationships involving domestic violence, abusers use intimidation "to either gain compliance or gain control of the victim, or regain control, power and control over the victim." Domestic abuse starts with emotional or mental abuse. In most relationships where domestic abuse is taking place, the abuser isolates the victim from their friends and family so that the abuse will continue unreported. Abusers frequently threaten their victims to control them. Victims often do not report the abuse; when they do, they often blame themselves or recant. Finally, victims also often remain with their abusers because they have children with, and are afraid of, their abusers.

[5] "In 2004, the Legislature amended [ ] section 1107(d), changing all references from 'battered women's syndrome' to 'intimate partner battering and its effects.'" Previous decisional law continues to apply." (CALCRIM No. 850, Bench Notes; § 1107, subd. (f).)

simply no merit to appellant's contention that CALCRIM No. 850 suggested Doe was "more believable," particularly where the court also delivered CALCRIM No. 303, which advised the jury that certain evidence — including White's testimony — "was admitted for a limited purpose" and that the jury could "consider that evidence only for that purpose and for no other."

We also reject appellant's claim that instructing the jury with CALCRIM No. 850 led the jury to convict appellant "'on a lesser showing than due process requires.'" The court instructed the jury that the People had the burden of proving appellant's guilt beyond a reasonable doubt. CALCRIM No. 850 does not address the prosecution's burden of proof. Moreover, appellant's reliance on *Victor v. Nebraska* (1994) 511 U.S. 1, 22, is misplaced. In that case, the United States Supreme Court held that instruction defining "reasonable doubt" did not violate the due process clause.

The Court Did Not Err by Instructing the Jury with CALCRIM No. 1190

Appellant's final argument is the court erred by instructing the jury with CALCRIM No. 1190, which provides: "Conviction of a sexual assault crime may be based on the testimony of a complaining witness alone."[6] According to appellant, CALCRIM No. 1190 "improperly lighten[ed] the prosecution's burden of proof" by "propping up the testimony of a complaining witness[.]"

The California Supreme Court rejected this argument in *People v. Gammage* (1992) 2 Cal.4th 693, 700. There, the trial court instructed the jury with CALJIC No. 2.27, a predecessor to CALCRIM No. 301, and with 10.60, the predecessor to CALCRIM No. 1190. The *Gammage* court held that CALJIC No. 10.60 correctly stated the law that "'conviction of a sex crime may be sustained upon the uncorroborated testimony'" of the complaining witness alone. (*Gammage*, 2 Cal.4th at p. 700, quoting *People v. Poggi* (1988) 45 Cal.3d 306, 326.) The court explained that CALJIC No. 10.60 did not single "out . . . the testimony of the prosecuting witness with a view of giving it undue

---

[6] The court also instructed the jury with CALCRIM No. 301, which provides: "The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence."

prominence before the jury. [Citation.] Nor do the instructions 'dilute[ ] the "beyond a reasonable doubt" standard.' [Citation.]" (*Gammage, supra*, at p. 701.)

Appellant's contention —unsupported by any authority — that "*Gammage* [ ] answered the wrong question" has no merit. There is no flaw in our high court's analysis. *Gammage* is controlling here (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455) and the trial court properly instructed the jury with CALCRIM No. 1190.

DISPOSITION

The judgment is affirmed.

_____

Jones, P.J.

We concur:

_____

Simons, J.

_____

Needham, J.